Honorable Catherine Shaffer
Hearing Date: May 15, 2020 at 10:00 a.m.
With Oral Argument (if ordered)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ANGELA KELLY; and JANYCE L. MACKENZIE,

Plaintiffs,

v.

COOPER TIRE & RUBBER COMPANY, a Delaware corporation; TBC CORPORATION, a Delaware corporation; MEINEKE CAR CARE CENTERS, LLC, a North Carolina corporation; MCCC 4333, INC. d/b/a MEINEKE CAR CARE CENTERS #4333, a Washington corporation; and SEARS, ROEBUCK AND CO., d/b/a SEARS AUTO CENTER and/or SEARS, ROEBUCK AND CO. #2049 a New York corporation,

Defendants.

ANGELA KELLY,

Cross-Claimant

v.

JANYCE L. MACKENZIE,

Cross-Claim Defendant.

NO. 18-2-17249-7 SEA

DEFENDANT MEINEKE CAR CARE CENTERS, LLC'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

REPLY

A. Meineke Objects to MacKenzie's Unpled Product Liability Claim, and Is Not Addressing it on the Merits.

MacKenzie's second amended complaint fails to assert a product liability claim against Meineke for anything, including, but not limited to "defective inspection worksheets." She raises this new claim for the first time in her response to Meineke's motion for summary judgment. *See* Resp. at 2:16-24; 15:15-18; 17:12-22:2. Likewise, she injects "product" and "design" into her vicarious liability and agency arguments. Resp. at 27:5-13.

"[N]otice pleading under CR 8 does not allow a plaintiff to allege only the factual basis in its pleading, leaving the plaintiff unrestricted as to any particular legal theory." *Reagan v. Newton*, 7 Wn. App. 2d 781, 801, 436 P.3d 411 (2019), citing *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006) (stating that a complaint is insufficient if it fails to give the defendant fair notice of the claims asserted). Under CR 8, Meineke has received no notice of MacKenzie's unpled claim.

Likewise, under CR 15(b), Meineke expressly and/or impliedly does not consent to litigate MacKenzie's unpled product liability claim. Meineke is not addressing it on the merits in this reply brief or at oral argument. Because Meineke refuses to address MacKenzie's unpled claim, the claim may not be raised under CR 15(b). *Reagan*, 7 Wn. App. 2d at 802; *see also* CR 15(b) ("When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."); *Dewey v. Tacoma Sch. Dist*., 95 Wn. App. 18, 26, 974 P.2d 847 (1999) (holding that the trial court did not err in ruling that plaintiff's new First Amendment claim was not tried by implication

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

and that defendant's argument that the plaintiff failed to plead a First Amendment theory of recovery did not constitute a trial of the issue). Based on the foregoing, the Court should rule that Meineke is not expressly or impliedly consenting to litigate the unpled product liability claim.

B. Plaintiff Offers No Actual Evidence of Control Over MCCC 4333's Day-to-Day Operations to Impose Vicarious Liability for Any Acts or Omissions by MCCC 4333's Employees.

The cases cited by Plaintiff confirm the legal principal that no agency relationship exists between two parties without *consent and control*, either by express agreement or implied from the actions of the parties. *See Matsumura v. Eilert*, 74 Wn.2d 362, 444 P.2d 6806 (1986); *Busk v. Hoard*, 65 Wn.2d 126, 396 P.2d 171 (1964); *Petersen v. Turnbull*, 68 Wn.2d 231, 412 P.2d 349 (1966); *Rho Co. v. Dep't of Revenue*, 113 Wn.2d 561, 782 P.2d 986 (1989). Plaintiff presents no admissible evidence that Meineke or MCCC 4333 expressly consented to an agency relationship—in fact, it is undisputed that the franchise agreement expressly states that there is no agency relationship. Likewise, it is uncontroverted that the parties' actions did not create any implied agency—Plaintiff does not dispute that Kyle Johnson, 4333's manager, was in sole control of 4333's day-to-day operations; that all employees knew that they were employed by 4333, *not* Meineke; and that they were an independently owned and operated business.[1]

[1] Motion (Dkt. No. 186) at 8:14-19; 9:5 – 10:13. Plaintiff's assertion that Meineke "often" referred to corporate and franchise-owned stores "collectively" without distinguishing them is untrue. The only evidence upon which Plaintiff relies to support this supposition is an email from Brett Harrison in June 2018, *when Mr. Harrison was employed by the 4333's ownership group and was not Meineke's "Corporate FBC."* The record is clear that Mr. Harrison left Meineke in spring 2017, and was employed with 4333's ownership group in August 2017. In fact, the email upon which Plaintiff relies clearly identifies Mr. Harrison as "MCCC Group Manager."

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

Plaintiff relies on three cases that are neither binding precedent nor citied by the Washington appellate courts. *See* Resp. at 26:7-22. Regardless, even under *Bartholomew* and *Miller*, the clear and undisputed facts in this case establish that Meineke does not direct the manner, nature, and extent of the courtesy inspection. While it provides *guidelines and best practices* through the playbook and the standardized inspection form, it does not control exactly how—or even if—the inspection occurs.[2] Unlike the franchisors in *Bartholomew* and *Miller*, who had the right to control how food was handled and prepared, Meineke has no right to control—and in fact does not control—how courtesy inspections are performed.

Plaintiff does not dispute that 4333 alone established the expectations and requirements placed upon its technicians in the performance of day to day operations, including the courtesy inspection. *See* Resp. at 6, fn. 31. It is further undisputed that 4333's manager, Kyle Johnson, solely controlled the day-to-day operations including employee training, overseeing vehicle inspections, controlling how the inspections were performed, and whether inspections were performed and reported to MCCC Group managers—Meineke had absolutely no involvement. Motion (Dkt. No. 186) at 13:12 – 15:16. Plaintiff submits no admissible evidence to create genuine issues of material facts of the foregoing

Finally, to the extent the Court considers foreign authority that is consistent with Washington law, *Greil v. Travelodge, In'l.* supports Meineke's position—actual agency only exists if a franchisor has imposed controls *beyond* those necessary to protect its trademarks (and the goodwill of the marks). *Greil,* 186 Ill. App. 3d 1061, 1069, 541 N.E.2d 1288 (1989). This

---

[2] *Id.* at 5:16 – 6:8; 9:5 – 10:13.

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

remains consistent with the controlling Washington authority, *Folsom v. Burger King,* and the cases cited in Meineke's motion. Here, the undisputed evidence establishes that Meineke's right to inspect and require compliance extended only to ensuring that its marks—including goodwill and reputation--were protected. Accordingly, as Meineke did not have any right to control the performance of the inspections (and did not do so) and retained rights only insofar as to protect its marks, there is no agency relationship, and summary judgment is proper.

C. No Evidence in the Record Supports a Finding of Apparent Agency.

Plaintiff presents no evidence that Meineke made *any* objective manifestations that would lead any person to believe that 4333 was its agent. Self-serving affidavits that contradict prior deposition testimony and other documentary evidence cannot be used to create a genuine issue of material fact and are insufficient to defeat summary judgment. *Marshall v. Ac&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). Here, all Plaintiff offers to support her assertion of apparent agency are self-serving declarations that contradict her and Mr. MacKenzie's prior, sworn testimony with respect to why they brought the Ford Explorer to MCCC 4333. Plaintiff's prior sworn deposition testimony clearly states that she took her vehicle to 4333 for service because there was a special sale advertised at that particular franchisee location.

Q: Okay. Had you been to that Meineke Car Care Center prior to April 22, 2016?

A: Not to my knowledge.

Q: And why did you choose to go there?

A: My husband picked it.

Q: And did he tell you why he picked it?

A: They had a special.

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

Daylong Decl. (Dkt. No. 187), Ex. A, at 55:3-6. Plaintiff further confirmed that she took the vehicle to 4333 for a pre-trip inspection because of a special 4333 advertised on a sandwich board she saw as she drove by. *Id.* at 64:9 – 65:23. Likewise, Dennis MacKenzie's prior sworn testimony is devoid of any reference to Meineke's advertising or any reasonable belief that 4333 was Meineke's agent—Mr. MacKenzie testified that he had good service *at 4333*[3] on prior occasions on a different vehicle. *Daylong Decl*., **Ex. P**, at 36:23 – 37:4. At no point did either Plaintiff or her husband respond that they took the Explorer for service at 4333, due to "national advertising" or "national reputation."[4] To the contrary, it was due to service experience and advertising *specific to 4333*. The Court should grant summary judgment dismissal of the "apparent agency" claim as a matter of law.

Meineke never represented to Plaintiff or to the public that it was 4333's principal—Plaintiff relies solely upon her belief and general impression from 4333's marketing and advertising to establish that there was apparent agency. Even if Plaintiff and her husband saw Meineke advertising and recognized the brand name, this is insufficient to establish apparent agency. *See D.L.S. v. Maybin*, 130 Wn. App. 94, 102-03, 121 P.3d 1210 (2005) (stating general impressions from a franchisor's national marketing and brand recognition/goodwill efforts are insufficient to create an apparent agency relationship between a franchisor and franchisee or a franchisee's employees); Motion (Dkt No. 186) at 24.

---

[3] Mr. MacKenzie referred to it as "*that* Meineke."

[4] Regardless, even if she had, this is insufficient as an objective manifestation by Meineke or reasonable belief by Plaintiff to create apparent agency with 4333 or its employees. *See D.L.S. v. Maybin*, 130 Wn. App 94, 102-03, 121 P.3d 1210 (2005).

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

Finally, Plaintiff wholly mischaracterizes the record by asserting that 4333 was not required to clearly identify itself as an independently owned and operated franchise location—the plain language of the Franchise Agreement required it to do so. *Pollack Decl. (Dkt. No. 188)*, Exhibit A at ¶16.1 ("You agree to conspicuously identify yourself in all dealings with customers . . . and agree to place such other notices of independent ownership at your Center and on forms, business cards, stationary, advertising, and other materials[.]"). Liability for any failure by 4333 to adhere to the requirement of Section 16.1 and failing to properly and conspicuously identify itself as an independent franchisee lies with 4333, and not Meineke.

Thus, *any* claim of apparent agency fails as a matter of law because (1) Meineke made *no* objective manifestations at any point in time that 4333 was its agent; (2) there is no evidence in the record that Plaintiff or her husband reasonably believed that 4333 was Meineke's agent; and (3) other than self-serving affidavits that contradict their prior sworn testimony, Plaintiff presents no admissible evidence that she relied on any representation by *Meineke*—versus the service and advertisements of 4333—in bringing the Explorer to 4333 for service on August 2, 2016.

Summary judgment as to all of Plaintiff's claims against Meineke should be dismissed as a matter of law.

//

//

//

//

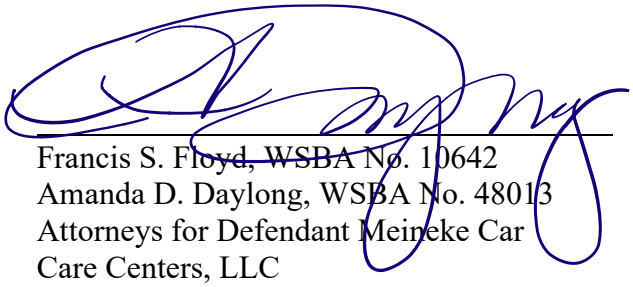
//

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

I certify that this memorandum contains fewer than 1,750 words pursuant to the Local Rules.

DATED this 11th day of May, 2020.

FLOYD, PFLUEGER & RINGER, P.S.



Francis S. Floyd, WSBA No. 10642
Amanda D. Daylong, WSBA No. 48013
Attorneys for Defendant Meineke Car Care Centers, LLC

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

DECLARATION OF SERVICE

Pursuant to RCW 9A.72.085, I declare under penalty of perjury and the laws of the State of Washington that on the below date, I delivered a true and correct copy of *DEFENDANT MEINEKE CAR CARE CENTERS, LLC'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT* via the method indicated below to the following parties:

James S. Rogers Heather M. Cover Law Offices of James S. Rogers 1500 Forth Avenue, Suite 500 Seattle, WA 98101 jsr@jsrogerslaw.com heather@jsrogerslaw.com	*Counsel for Plaintiff Angela Kelly*	[ ] Via Messenger [X] Via King County E-Service/Email [ ] Via Facsimile [ ] Via U.S. Mail
Steven B. Hay Steven B. Hay & Associates 1215 120th Avenue NE, Suite 110 Bellevue, WA 98005 steveh@haylaw.com	*Counsel for Plaintiff Angela Kelly*	[ ] Via Messenger [X] Via King County E-Service/Email [ ] Via Facsimile [ ] Via U.S. Mail
Lawrence M. Kahn Lawrence Kahn Law Group PS 1424O Interurban Ave S., Ste B132 Tukwila, Washington 98168 LMK@lklegal.com staff@lklegal.com	*Counsel for Plaintiff Janyce L. MacKenzie*	[ ] Via Messenger [X] Via King County E-Service/Email [ ] Via Facsimile [ ] Via U.S. Mail
Nicolas Rowley Courtney Rowley Keith Bruno John Kawai Carpenter, Zuckerman & Rowley 407 Bryant Circle, Suite F Ojai, CA 93023 nick@tl4j.com therowleylawfirm@gmail.com Kbruno@czrlaw.com jk@czrlaw.com		

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

R. Scott Fallon Nancy McKinley Fallon McKinley & Wakefield 1111 Third Avenue, Suite 2400 Seattle, WA 98101 bfallon@fallonmckinley.com nmckinley@fallonmckinley.com	*Counsel for Defendant MCCC #4333*	[ ] Via Messenger [X] Via King County E-Service/Email [ ] Via Facsimile [ ] Via U.S. Mail
David Shaw Ryan Vollans Williams, Kastner & Gibbs PLLC 601 Union Street, Suite 4100 Seattle, WA 98101 dshaw@williamskastner.com rvollans@williamskastner.com cberry@williamskastner.com	*Counsel for Defendant Sears, Roebuck & Co.*	[ ] Via Messenger [X] Via King County E-Service/Email [ ] Via Facsimile [ ] Via U.S. Mail
Ryan J. Hall Cole, Wathen, Leid, Hall, P.C. 303 Battery Street Seattle, WA 98121 rhall@cwlhlaw.com	*Counsel for Cross Claim Defendant Janyce MacKenzie*	[ ] Via Messenger [X] Via King County E-Service/Email [ ] Via Facsimile [ ] Via U.S. Mail

DATED this 11th day of May, 2020.

/s/ Sophia E. S. Katinas
Sophia E. S. Katinas, Legal Assistant

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

Honorable Catherine Shaffer
Hearing Date: May 15, 2020, 10:00 a.m.
With Oral Argument (if ordered)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ANGELA KELLY; and JANYCE L. MACKENZIE,

Plaintiffs,

v.

COOPER TIRE & RUBBER COMPANY, a Delaware corporation; TBC CORPORATION, a Delaware corporation; MEINEKE CAR CARE CENTERS, LLC, a North Carolina corporation; MCCC 4333, INC. d/b/a MEINEKE CAR CARE CENTERS #4333, a Washington corporation; and SEARS, ROEBUCK AND CO., d/b/a SEARS AUTO CENTER and/or SEARS, ROEBUCK AND CO. #2049 a New York corporation,

Defendants

ANGELA KELLY,

Cross Claimant,

v.

JANYCE L. MACKENZIE,

Cross-claim Defendant

NO. 18-2-17249-7 SEA

[PROPOSED]

ORDER GRANTING DEFENDANT MEINEKE CAR CARE CENTER, LLC'S MOTION FOR SUMMARY JUDGMENT

Clerk's Action Required

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

THIS MATTER, having come before the Court on Defendant Meineke Car Care Center, LLC's Motion for Summary Judgment, and the Court having reviewed the pleadings and documents submitted by the parties, including:

1. Defendant Meineke Car Care Center, LLC's Motion for Summary Judgment;
2. Declaration of Amanda D. Daylong, with Exhibits;
3. Declaration of Noah Pollack, with Exhibits;
4. Plaintiff's Response to Defendant Meineke Car Care Centers, LLC's Motion for Summary Judgment;
5. Declaration of Lawrence M. Kahn, with Exhibits;
6. Declaration of Thomas H. Vadnais, P.E.;
7. Declaration of Janyce MacKenzie;
8. Declaration of Dennis MacKenzie;
9. _____;
10. _____;
11. Defendant Meineke Car Care Centers, LLC's Reply in Support of Motion for Summary Judgment;
12. All records, documents, and filings in the Court's record; and
13. The parties' oral arguments (if applicable).

And deeming itself otherwise fully advised in the premise, IT IS HEREBY ORDERED that Defendant Meineke Car Care Center, LLC's Motion is hereby GRANTED. By way of further order:

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

The Court is not applying Civil Rule 15(b) and is not addressing Plaintiff MacKenzie's unpled product liability claim.

The Court further finds that, as a matter of law, Defendant Meineke Car Care Center, LLC did not owe a duty of care to Plaintiffs Angela Kelly and Janyce McKenzie. Should Meineke Car Care Center #4333 be found liable, this Court finds Defendant Meineke Car Care Center, LLC cannot be held vicariously liable for the negligence of its franchisee.

The Court therefore dismisses Plaintiffs' claims against Meineke Car Care Center, LLC with prejudice, and without an award of costs to any party.

SIGNED this _____ of _____, 2020.

_____
HON. CATHERINE SHAFFER

Presented by:

FLOYD, PFLUEGER & RINGER, P.S.

By: /s/ Amanda D. Daylong
Francis S. Floyd, WSBA No. 10642
Amanda D. Daylong, WSBA No. 48013
Attorneys for Defendant Meineke Car Care Centers, LLC

FLOYD, PFLUEGER & RINGER P.S.
200 W. THOMAS ST., SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484